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Sprain Brook Manor Nursing Home, LLC and 1199 SEIU United Healthcare Workers East. Cases 02–CA–040231, 02–CA–040385, and 02–CA–072458

September 29, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On April 26, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 105. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.¹ Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 105, which is incorporated herein by reference. The judge's recommended Order, as further modified herein, is set forth in full below.²

¹ In adopting the judge's findings that the discharge of Catherine Alonso and the suspension and discharge of Karen Bartko were unlawful, we do not rely on *Relco Locomotives, Inc.*, 358 NLRB No. 32, slip op. at 1 fn. 4 (2012), or *USC University Hospital*, 358 NLRB No. 132, slip op. at 1 fn. 2 (2012). In lieu of *USC University Hospital*, we rely on *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011).

² We shall modify the judge's recommended Order to include standard remedial language requiring the Respondent to bargain with the Union over the changes that it unlawfully unilaterally implemented. We shall also modify the judge's recommended Order in accordance with our recent decision in *Tortillas Don Chavas*, 361 NLRB No. 10

ORDER

The National Labor Relations Board orders that the Respondent, Sprain Brook Manor Nursing Home, LLC, Scarsdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals for seeking assistance from New York's Health and Human Services Union 1199/SEIU, or any other labor organization.

(b) Threatening employees that if they seek union representation they will not receive payments owed to them in connection with the compliance settlement in *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007).

(c) Suspending, discharging, or otherwise discriminating against any employee for supporting New York's Health and Human Services Union 1199/SEIU, or any other labor organization.

(d) Changing the terms and conditions of employment of its unit employees, without first notifying the Union and giving it an opportunity to bargain, by

(1) Discontinuing the provision of hot lunches to employees.

(2) Ceasing on-site check-cashing privileges.

(3) Discontinuing free onsite physical examinations.

(4) Discontinuing medical expense payouts to employees.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Catherine Alonso and Karen Bartko full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Catherine Alonso and Karen Bartko whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Catherine Alonso and Karen Bartko for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay

(2014). In addition, we shall substitute a new notice in accordance with *Tortillas Don Chavas*, supra, and *Durham School Services*, 360 NLRB No. 85 (2014), and to conform to our modified Order.

awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline and discharges will not be used against them in any way.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the Employer at its facility located at 77 Jackson Avenue, Scarsdale, NY, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

(f) Rescind the above-described unilaterally implemented changes in the unit employees' terms and conditions of employment and bargain collectively with the Union with respect to those terms and conditions of employment.

(g) Make employees whole for any losses they may have incurred as a result of the above-described unilateral changes, plus interest compounded daily.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Scarsdale, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on

forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2010.

(j) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by Respondent's owner, Robert Klein, or Administrator Shlomo Mushell, or at the Respondent's option, by a Board agent in the presence of Klein or Mushell, with translation available if the Regional Director determines that the presence of an interpreter is appropriate.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals for seeking assistance from New York's Health and Human Services Union 1199/SEIU, or any other labor organization.

WE WILL NOT threaten you that if you seek union representation you will not receive payments owed to you in connection with the compliance settlement in *Sprain Brook Manor Nursing Home*, 351 NLRB 1199 (2007).

WE WILL NOT suspend, discharge or otherwise discriminate against you for supporting New York's Health and Human Services Union 1199/SEIU, or any other labor organization.

WE WILL NOT change your terms and conditions of employment, including the changes listed below, without first notifying the Union and giving it an opportunity to bargain:

(1) Discontinuing the provision of hot lunches to employees.

(2) Ceasing onsite check-cashing privileges.

(3) Discontinuing free onsite physical examinations.

(4) Discontinuing medical expense payouts to employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Catherine Alonso and Karen Bartko full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Catherine Alonso and Karen Bartko whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest compounded daily.

WE WILL compensate Catherine Alonso and Karen Bartko for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Karen Bartko and the unlawful discharges of Catherine Alonso and Karen Bartko, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by us at our facility located at 77 Jackson Avenue, Scarsdale, NY, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

WE WILL rescind the above-described changes in unit employees' terms and conditions of employment that were unilaterally implemented and WE WILL bargain collectively with the Union with respect to those terms and conditions of employment.

WE WILL make our bargaining unit employees whole for any losses they may have incurred by virtue of our unlawful unilateral changes to their terms and conditions of employment, plus interest compounded daily.

SPRAIN BROOK MANOR NURSING HOME, LLC

The Board's decision can be found at www.nlr.gov/case/02-CA-040231 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations

Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

